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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS TRUST NEW YORK CORPORATION AND CONSOLIDATED SUBSIDIARIES,

Appellants,

v.

DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK AND PAUL A. CROTTY, AS COMMISSIONER OF FINANCE,

Appellees.

On Appeal from the Supreme Court of the State of New York, Appellate Division, First Judicial Department

JURISDICTIONAL STATEMENT

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March 6, 1987

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QUESTIONS PRESENTED

1. Is the income-based New York City Financial Corporation Tax a franchise tax or nonproperty tax in lieu thereof, or, as appellants contend, does it impermissibly tax interest received on debt obligations of the United States Government in violation of the Supremacy Clause and the Borrowing Power Clause of the United States Constitution and Rev. Stat. § 3701, 31 U.S.C. § 742 (now § 3124(a)), which expressly provides that Federal obligations shall be exempt from state, municipal and local taxes except for nondiscriminatory franchise taxes or nonproperty taxes in lieu thereof?

2. Must the decision below be reversed because it is inconsistent with this Court's decision in *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, *reh'g denied*, 463 U.S. 1250 (1983)?

DESIGNATION OF PARTIES

The appellees are identified in the caption appearing on the cover and at page one of this statement. Non-wholly owned subsidiary or affiliated companies of appellants, Bankers Trust New York Corporation and Consolidated Subsidiaries, are:

Administradora de Fondos de Pensiones Provida S.A.

ADS Associates, Inc.

Anscor Capital & Investment Corp.

Banco Iochpe de Investimento S.A.

Bond Insurance Group Inc.

CEDEL

Compania de Seguros de Vida Consorcio Nacional de Seguros S.A.

COPEC

Export Credit Insurance Corp. of Singapore

General Exploration Company

Iochpe Trade S.A. Comercio International

I.M. Trust

Infinity Broadcasting

National Investment Trust Company Ltd.

Petroquimica del Atlantico S.A.

Private Export Funding Corporation

PT Bankers Trust Lippo Leasing

Sernic S.A. Comercio e Servicos

South Texas Drilling & Exploration

Thai Investments & Securities Co. Ltd.

Tun Thamrong Co. Ltd.

United Bank for Africa Ltd.

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4. Bankers Trust's claim was properly raised before the City and, in any event, the City's procedural argument that it was not does not defeat the jurisdiction of this Court because there is unquestionably no "plain statement" that the decision below rested on this ground 17

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Appellants,

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DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK AND PAUL A. CROTTY, AS COMMISSIONER OF FINANCE,

Appellees.

On Appeal from the Supreme Court of the State of New York, Appellate Division, First Judicial Department

JURISDICTIONAL STATEMENT

Appellants, Bankers Trust New York Corporation and Consolidated Subsidiaries ("Bankers Trust"), appeal from the final judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, dated May 27, 1986.[1] The judgment of the Appellate Division affirmed the

[1] By an order entered September 11, 1986, the Court of Appeals of the State of New York dismissed *sua sponte* for lack of a substantial constitutional question

(footnote continued)

administrative decision of appellees, the Department of Finance of the City of New York and Paul A. Crotty, as Commissioner of Finance (the "City"), which determined that New York City could tax, under the New York City Financial Corporation Tax (the "Bank Tax"), the interest earned on Federal obligations held by Bankers Trust. Appellees based their administrative decision on their erroneous determination that the Bank Tax was a "franchise tax" or "nonproperty tax in lieu thereof" within the meaning of Rev. Stat. § 3701, 31 U.S.C. § 742 (now § 3124(a)). In affirming, the court sustained the imposition of a municipal tax on interest earned on Federal obligations. Such a tax is impermissible under the Supremacy Clause and the Borrowing Power Clause unless the tax falls within the exception for franchise taxes or nonproperty taxes in lieu thereof created by Congress in Rev. Stat. § 3701.

Opinions Below

The administrative decision of the City is not reported but is included in the appendix, starting at 14a.[2] The judgment of the Appellate Division was rendered without an opinion. The order of the Appellate Division is included in the appendix at 20a. The order of the Court of Appeals dismissing the appeal *sua sponte* is included in the appendix at 22a and the order of the Court of Appeals denying Bankers Trust's motion for leave to appeal is included in the appendix at 23a. Neither order of the Court of Appeals was accompanied by an opinion.

Jurisdiction

The judgment of the Appellate Division upholding the imposition of the Bank Tax on the interest earned on Federal obligations held by Bankers Trust was entered on May 27, 1986. (20a)

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a timely appeal from the Appellate Division decision. Bankers Trust then timely moved for leave to appeal, which was denied by the Court of Appeals in an order entered December 16, 1986.

[2] Numbers followed by the letter "a" refer to pages of the appendix hereto.

That judgment became the final judgment of the highest court in which review could be had on December 16, 1986, when the Court of Appeals entered an order denying the motion of Bankers Trust for leave to appeal. (23a) The notice of appeal to this Court was filed in the Appellate Division on February 6, 1987. (24a)

This appeal is being docketed in this Court within 90 days from December 16, 1986, the date of entry of the order of the Court of Appeals denying Bankers Trust's motion for leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1982).

Constitutional Provisions and Statutes

U.S. Const. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. Const. art. I, § 8, cl. 2:

> The Congress shall have Power. . . To borrow Money on the credit of the United States. . .

Rev. Stat § 3701, 31 U.S.C. § 742 (1977):

> [A]ll stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in

> lieu thereof imposed on corporations and except estate taxes or inheritance taxes.[3]

The pertinent provisions of the Bank Tax, New York City Administrative Code § R46-37.1 *et seq.* (now § 11-639(a) *et seq.*)[4] appear in the appendix, starting at 6a.

Statement of the Case

Bankers Trust is one of the more than 200 banks located in New York City. 2 *Rand McNally International Bankers Directory* 2233-2337 (U.S. Master 1986). Bankers Trust holds United States obligations as reserve investments. In 1977, the tax year in issue, the average daily balance of obligations of the United States held by Bankers Trust for investment was approximately $555,000,000. Like many banks, Bankers Trust is also a dealer in United States obligations and holds substantial amounts of such obligations in inventory.

The City imposes the Bank Tax "[f]or the privilege of doing business in the city in a corporate or organized capacity. . ." N.Y.C. Admin. Code § R46-37.1(a) (now § 11-639(a)). (6a) The

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[3] In 1982, 31 U.S.C. § 742 was recodified as 31 U.S.C. § 3124(a), as follows:

> Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except –
>
> (1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and
>
> (2) an estate or inheritance tax.

The House Report (Judiciary Committee) H.R. Doc. No. 97-651, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1895, stated that no substantive change was intended by this codification.

[4] The New York City Administrative Code was recodified effective September 1, 1986. The citations in effect in the year in issue will be used here, with the new section numbers provided in parentheses thereafter.

Bank Tax is assessed on the entire net income of a bank and interest from United States obligations is included in entire net income for Bank Tax purposes. N.Y.C. Admin. Code § R46-37.3 (now § 11-641). (7a, 18a) In 1977 the Bank Tax was imposed at a rate of 13.823 per cent. The 1977 Bank Tax collected by the City from Bankers Trust included $3,599,986.23 which was 13.823 per cent of the $26,043,451.00 in interest which Bankers Trust received on Federal obligations.

By a Notice of Determination dated December 13, 1982 and a Revised Notice of Determination dated April 12, 1983, the City proposed to assess Bankers Trust with additional Bank Tax for the 1977 taxable year based on issues not pertinent to this appeal.[5] Bankers Trust filed a timely Petition for Hearing on March 11, 1983, in response to the first Notice of Determination, and a Revised Petition on June 30, 1983, in response to the Revised Notice of Determination. An evidentiary hearing was held before the City from May 17, 1983 through June 2, 1983. The record was reopened for the submission of additional evidence on June 30, 1983.

On July 11, 1983, Bankers Trust submitted a Supplement to Grounds for Petition to bring to the attention of the City the decision of this Court in *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, *reh'g denied*, 463 U.S. 1250 (1983), which had been decided only six days before, on July 5, 1983.[6] In the Supplement Bankers Trust claimed that since the Bank Tax was not a franchise tax under Rev. Stat. § 3701, 31 U.S.C. § 742 (hereafter referred to as section 3701), the amount of interest income which Bankers Trust received on United States obligations should not have been included in its net income when the

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[5] Bankers Trust and the City had previously agreed to waivers of the statute of limitations pursuant to N.Y.C. Admin. Code § R46-64.0(3)(b) (now § 11-674(3)(b)) (8a) which kept the 1977 year open for both deficiencies and refunds at least until December 1983.

[6] This Supplement was timely filed since it was submitted within the ninety-day period allowed for a new petition after the City had issued the Revised Notice of Determination on April 12, 1983. N.Y.C. Admin. Code § R46-70.0(2) (now § 11-680(2)). (11a)

City calculated the Bank Tax due from Bankers Trust for 1977. Accordingly the Supplement asked that the Bank Tax which the City had collected on the income from Federal obligations held by Bankers Trust be refunded. Bankers Trust set forth its position on the section 3701 issue in detail in a brief timely filed with the Bureau of Hearings of the Department of Finance on July 25, 1983, which the City opposed in an answering brief filed August 15, 1983.

The Decision of the City

Fifteen months later, by its Final Determination dated November 27, 1984 (14a), the City denied Bankers Trust's claim for a refund. The City determined that Bankers Trust had not shown that section 3701 required that the City exclude interest on United States obligations from net income when assessing the Bank Tax. The City found that the Bank Tax was imposed pursuant to New York State enabling legislation which authorized municipalities to levy taxes "essentially the same" as the state's franchise tax on banking corporations and that "the state intended to and did authorize the City to levy 'franchise taxes' or, at the very least, 'nonproperty taxes in lieu thereof imposed on corporations.' " (18a-19a) In so holding the City found the recent decision of this Court in *American Bank* inapplicable because "[t]hat case dealt specifically with a Texas *property* tax on bank shares." (19a) (emphasis in original)

The City also determined that Bankers Trust's claim that the City had impermissibly assessed the Bank Tax on income on Federal obligations was not properly raised before the City because it was raised after the close of the evidentiary hearing. (17a)

Judicial Proceedings

Bankers Trust instituted a judicial proceeding to review and annul the administrative determination of the City. Bankers Trust argued before the Appellate Division of the New York Supreme Court that the Bank Tax was not a franchise tax or nonproperty tax in lieu thereof under section 3701 and that its claim was properly raised. The City argued in opposition that the Bank Tax

was either a franchise tax or nonproperty tax in lieu thereof and that Bankers Trust's claim for a refund was barred by the statute of limitations. The City also argued that no refund should be granted because the City had prepared its budget in reliance on the validity of the tax and if Bankers Trust were granted a refund other banks would probably want one also. Fourteen days after oral argument the Appellate Division affirmed the determination of the City without an opinion. (20a)

Bankers Trust then brought an appeal to the Court of Appeals. That court dismissed the appeal *sua sponte*. (22a) Bankers Trust then moved before that court for leave to appeal, which motion was denied. (23a) Through such perfunctory treatment the state courts ignored the importance of this case and completely without explanation fostered local interests at the expense of the United States.

THE QUESTIONS ARE SUBSTANTIAL

In Affirming The Decision Of The City That The City Can Tax Interest Earned On Obligations Of The United States, The State Court Allowed The City To Levy A Tax In Violation Of Federal Law.

The City has taxed the interest on United States obligations in violation of Federal law. As this Court has noted, in 1959 Congress made a "sweeping" amendment to section 3701, expressly providing that state or municipal taxation of interest on obligations of the United States was prohibited except for franchise taxes or nonproperty taxes in lieu thereof. *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 862, *reh'g denied*, 463 U.S. 1250 (1983). This amendment, which was "principally a restatement of the constitutional rule" (*Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 397 (1983)), was part of a bill to raise the interest ceiling on various United States obligations in an effort to make them more attractive to investors. H.R. Rep. No. 1148, 86th Cong., 1st Sess. 1-5, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2769, 2770-74. Through this legislation Congress urged banks to purchase more United States obligations,

finding ownership to be "the patriotic responsibility not only of the individual but also of the banks, insurance companies, and mutual savings banks." 105 Cong. Rec. 18517 (1959).

Congress was aware that the rate of interest which the Federal government was forced to pay for the money it borrowed was determined by the marketplace and closely tied to the effective return which an investor would realize on United States obligations. As the Secretary of the Treasury stated, "I think that we would all agree that people who wanted to borrow money for corporations would try to borrow it as cheaply as they could." *Public Debt Ceiling and Interest Rate Ceilings on Bonds, Hearings Before the Committee on Ways and Means of the House of Representatives*, 86th Cong., 1st Sess. 134 (1950) (statement of Hon. Robert B. Anderson, Secretary of the Treasury). Congress was also told that banks were acutely sensitive to price changes in the bond market which affected their return on investment (*id.* at 159 (statement of Jullian B. Baird, Undersecretary for Monetary Affairs)) and that the Federal government was at a disadvantage relative to its competitors in pricing its obligations in the market. *Id.* at 134 (statement of Anderson).

When it broadened section 3701 Congress was thus seeking ways to get banks to purchase more Federal obligations while striving to reduce the cost of the national debt. Congress could not have intended that municipalities throughout the country be allowed to levy taxes based on income from United States obligations such as the Bank Tax.

Throughout its history the legislative purpose behind section 3701 has been " 'to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit.' *Smith v. Davis*, 323 U.S. 111, 117 (1944)." *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665, 675 (1950). The Bank Tax defeats this purpose by diminishing both the market value and the investment

attractiveness of United States obligations by much more than "the slightest degree".[7]

Imposition of the Bank Tax caused the United States to pay substantially more for the money it borrowed. If the City had not assessed the Bank Tax on the income from the Federal obligations held by Bankers Trust, it stands to reason that Bankers Trust would have accepted a lower interest rate on Federal obligations. The attractiveness of Federal obligations to Bankers Trust would have been greatly enhanced and their market value increased. The United States would have been able to pay less for the money it borrowed.

The Bank Tax, of course, does not affect Bankers Trust alone. New York City is a major international financial center. More than 200 banks from around the world are located there and are subject to the Bank Tax. As determined from their annual reports, as at December 31, 1985, the ten largest bank holding companies by amount of deposits located in New York City held for investment alone more than $14,000,000,000 in United States obligations.[8] Extrapolating from this statistic, it is likely that banks

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[7] During 1977, a bank in New York City was required to pay a 12 per cent New York State franchise tax plus the 13.823 per cent City Bank Tax on income from Federal obligations. Thus, the after-New York-tax rate of return to a bank in New York City on a five per cent United States bond was only 3.7 per cent. Even taking into account the fact that New York taxes were deductible in applying the Federal income tax (48 per cent in 1977), the after-New York-tax rate of return on a five percent bond was just 4.3 per cent. Ignoring the 12 per cent state tax, the City Bank Tax alone (after offset for Federal income tax) reduced the five per cent Federal interest rate to 4.6 per cent, a reduction of four-tenths of a percentage point in a market place where the unit of measurement is the "basis point" or hundredth of a per cent.

[8] The ten largest bank holding companies located in New York City, six of which were among the ten largest in the United States, were Citicorp, Chase Manhattan Corp., Manufacturers Hanover Corp., J.P. Morgan & Co. Inc., Chemical New York Corp., Bankers Trust New York Corp., Irving Bank Corp., Bank of New York Co., Inc., Republic New York Corp., and National Westminster Bank U.S.A. 1 *Moody's Bank & Finance Manual* a5-a6 (1986).

located in New York City may hold some $42,000,000,000 in United States obligations,[9] obligations upon which the United States is required to pay hundreds of millions of dollars more in interest because they are taxed under the Bank Tax.

Additionally, should the Bank Tax be sustained here as a franchise tax, other localities may enact similar taxes to gain revenue, further increasing the cost of borrowing of the United States and increasing in comparison the attractiveness of obligations offered by those localities with which the United States already competes for investor dollars. Should plenary review be denied the market value and investment attractiveness of United States obligations will be diminished and the borrowing power of the United States government will be unconstitutionally restrained by the City, in violation of both the Borrowing Power Clause and the Supremacy Clause. Resolution by this Court is necessary to effectuate the intent of Congress and prevent further litigation by other banks affected by the Bank Tax or similar taxes which may be created.

1. **The Bank Tax is not a franchise tax.**

Section 3701 "establishes a broad exemption of federal obligations from state and local taxation." *Memphis Bank*, 459 U.S. at 395. The City seeks to avoid this exemption, claiming in its determination that since the Bank Tax was authorized by New York State under enabling legislation which authorized taxes "essentially the same" as the State franchise tax on banks, the Bank Tax is a franchise tax. (18a) This contention must fail. Neither New York State nor the New York City administration which proposed the Bank Tax ever characterized the Bank Tax

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[9] As the ten largest bank holding companies in New York City held for investment more than $14,000,000,000 in United States obligations, if only 200 more banks in New York City each held only ten per cent of the average holdings of the ten largest bank holding companies, total holdings of United States obligations would now be approximately $42,000,000,000. This figure may be conservative. At year end 1978 approximately 12 per cent ($95,000,000,000) of the then outstanding gross public debt of the United States Treasury was held by commercial banks. G. Munn, *Encyclopedia of Banking and Finance* 958 (8th ed. 1983).

as a franchise tax. More importantly, the Congress did not intend municipal taxes such as the Bank Tax to be considered franchise taxes for purposes of section 3701.

The City does not have the power to levy a franchise tax on banks. Under the New York State Constitution only the state has the power to franchise a corporation, N.Y. Const. art. X, § 1, *see also* N.Y. Bus. Corp. Law § 102(4), (7) (McKinney 1963); or to charter or authorize a bank. N.Y. Banking Law §§ 24, 200, 260 (McKinney 1971).

In granting the franchise to banks the state gives to banks such privileges as the right to exist in corporate form, employ capital, own or lease property, or maintain an office anywhere in the state. As some noted commentators have stated, "it is difficult to understand by what authority the city purports to grant a privilege to engage in the very same activities within the city [especially since] while the state law explicitly provides that it is a franchise tax, the city law does not." 5 P. Comeau, R. Helm & J. Murphy, *New York Tax Service* XI-206 (1986) (footnotes omitted).[10]

That the Bank Tax does not provide that it is a franchise tax is a result of the deliberate action of the state legislature which did not grant the City the power to levy a franchise tax on banks. The New York State Constitution provides:

> - The power of taxation shall never be surrendered, suspended or contracted away, except as to securities

[10] The New York State franchise tax, which is entitled "Franchise Tax on Banking Corporations", provides for a tax upon a bank "[f]or the privilege of exercising its franchise or doing business in this state in a corporate or organized capacity . . ." N.Y. Tax Law § 1451 (McKinney 1975). This is in marked contrast to the City Bank Tax (formally known only as the Financial Corporation Tax) which levies a tax "[f]or the privilege of doing business in the city in a corporate or organized capacity . . ." N.Y.C. Admin. Code § R46-37.1(a) (now § 11-639(a)). (6a) The words "in a corporate or organized capacity" were added to the Bank Tax in 1972, without express designation in a state enabling act. *Compare* Chap. Law 772, § 12 (1966) (2a) *with* Chap. Law 874, § 1 (1972). (3a)

> issued for public purposes pursuant to law. *Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder* and provide for their review.

N.Y. Const. art. XVI, § 1 (emphasis added). Pursuant to this mandate for specificity, the state legislature, in Chapter Law 772 of 1966, the enabling act which authorized the Bank Tax, delegated to the City only the power to tax banks "for the privilege of doing business in the city". Chap. Law 772, § 12 (1966). (2a)

The City, by claiming to grant a franchise upon which the Bank Tax is based, is thus overstepping its bounds. Certainly, were Bankers Trust to fail to pay the Bank Tax, the City could not revoke the privilege granted to Bankers Trust by the state of exercising its franchise anywhere in the state and bar it from New York City.

That the state legislature never intended to grant the City the power to levy a franchise tax on banks is also demonstrated by the legislative history of the Bank Tax which describes the Bank Tax as an income tax and is utterly devoid of any contemporaneous characterization of it as a franchise tax. The legislative history of the enabling act which authorized the Bank Tax put the Bank Tax under the heading "Business income tax". *New York State Legislative Annual* 294 (1966). The Bank Tax was described as being intended to equalize the tax burden between different economic groups by taxing net income. *Id.* at 295. This language repeats that used by New York City Mayor John V. Lindsay when he recommended the bill for the enabling legislation to New York Governor Nelson Rockefeller. Letter from John V. Lindsay to Nelson Rockefeller (July 1, 1966) (Bill Jacket to Chapter Law 772).[11] Murray Drabkin, Mayor Lindsay's chief fiscal advisor,

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[11] In Mayor Lindsay's official *Statement to the Legislature of the State of New York in Support of a Tax Program for New York City*, dated March 9, 1966, submitted at the time the Bank Tax was proposed to the state legislature, the technical discussion of the tax stated (at p. 37):

(footnote continued)

spoke of the Bank Tax within the context of its being an income tax. *City Banks Call Tax Plan Illegal*, N.Y. Times, Apr. 7, 1966, at 1, col. 2. New York City banks and the news media also referred to the proposed Bank Tax as an income tax on banks. *Id.*

In construing the purpose of a tax "the declaration of the lawmaking power is entitled to much weight". *Flint v. Stone Tracy Co.*, 220 U.S. 107, 145 (1911). Here, where the proposers, creators, and critics of the Bank Tax unanimously termed it an income tax, the Bank Tax cannot be deemed a franchise tax.

The City may argue that a tax for the privilege of doing business is a franchise tax, yet as this Court has stated "[t]here is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question . . ." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977). Just because the rubric of privilege is uttered does not make a tax a franchise tax. A tax on income for the privilege of doing business within a municipality is in substance an income tax which cannot tax Federal obligations. *Cf. C.C. Collings & Co. Inc. v. Commonwealth*, 88 Pa. Commw. 184, 488 A.2d 1187 (1985), *aff'd*, 514 A.2d 1373 (Pa. 1986); *First Union Nat'l Bank v. Florida Dept. of Revenue*, No. BK-432 (Fla. Ct. App. Feb. 5, 1987) (state taxes designated as "privilege" or "franchise" taxes were really income taxes).

The Bank Tax is not one of those state franchise taxes which have been historically levied by states and which have previously been recognized by this Court. *See e.g. American Bank*, 463 U.S.

> The tax is levied for the privilege of doing business in the City rather than for the privilege of exercising the corporate franchise as provided in Section 219-q of the State Tax Law.

Similarly, in the "Memoranda of City of New York" it was stated:

> At present banks are not subject to the gross receipts tax. The proposed *business* tax would subject banks to a *tax on net income*.

New York State Legislative Annual 295 (1966) (emphasis added).

at 858, 866 n.11.[12] It is only those traditional franchise taxes which Congress intended to leave as the narrow exception to section 3701. *See American Bank*, 463 U.S. at 864. Whatever the meaning of "franchise tax" in section 3701, it cannot mean a tax imposed by a municipality that has no corporate franchising power, especially when both the statutory language and legislative history of the tax negate its status as a franchise tax.

As New York City inherently lacks the power to grant or revoke the franchise of banks located there, and the Bank Tax was never seen by its creators as a franchise tax, the only purpose which the City can now have for terming the Bank Tax a franchise tax is to bring the Bank Tax within the exceptions to section 3701 in order to tax the interest received on United States obligations. As this Court has declared, "[i]f the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail. . . ." *Miller v. Milwaukee*, 272 U.S. 713, 715 (1927).

The calculated portrayal now of the Bank Tax as a franchise tax is a "serious attack upon [the] immunity [of the United States obligations] when they are its obvious aim. In such a case the Court must consider the public welfare rather than the artifices contrived for private convenience and must look at the facts. *See Home Insurance Co. of New York v. New York*, 134 U.S. 594, 598 [(1890)]." *Miller*, 272 U.S. at 715 (additional citations omitted). This Court should examine the facts here to find that the

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[12] Although section 3701 does not specifically define the term "franchise tax," its meaning has been articulated by this Court in a long line of cases. *E.g.*, *Flint v. Stone Tracy Co.*, 220 U.S. 107, 163-65 (1910); *Home Ins. Co. v. New York*, 134 U.S. 594, 600 (1980). As stated in *Home Ins. Co.*:

> By the term 'corporate franchise or business,' as here used, we understand is meant . . . the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise.

134 U.S. at 599.

intentional use of the Bank Tax as a mechanism for taxing United States obligations is a direct unconstitutional assault upon the supremacy of the Federal government and upon the ability of the United States to borrow.

2. **The City's characterization of the Bank Tax as a franchise tax is in flagrant disregard for this Court's decision in the *American Bank* case.**

The City's imposition of the Bank Tax as a franchise tax ignores the decision of this Court in the *American Bank* case. In *American Bank*, this Court recognized that in broadening section 3701 "Congress intended to sweep away formal distinctions and to invalidate all taxes measured directly or indirectly by the value of federal obligations, except those specified in the amendment." 463 U.S. at 867. The catalyst for the amendment was an Idaho tax on individuals which was "measured" by net income rather than imposed on the net income itself. 463 U.S. at 865. Congress saw that the Idaho tax rested " 'upon a distinction of words which is without substance' " (463 U.S. at 866), and accordingly outlawed taxes where " 'computation of the tax' requires consideration of federal obligations." 463 U.S. at 867.

Here, the City of New York is overreaching no less abusively than was Idaho. The City is taxing income directly, computing the Bank Tax directly as a percentage of the income from United States obligations. The fact that it is only now calling the Bank Tax a franchise tax in an effort to reach those Federal obligations is particularly abusive because the City has no power to levy a franchise tax on bonds at all; only the state does. The City's attempt to tax Federal obligations based on a dictionary definition of franchise tax is an effort to "resurrect the formalistic approach" to section 3701 which Congress sought to abolish (463 U.S. at 867) and flies in the face of the decision of this Court.

3. **The Bank Tax is not a nonproperty tax in lieu of a franchise tax.**

Not only is the Bank Tax not a franchise tax, it is not a nonproperty tax in lieu of a franchise tax. "In lieu thereof" means

"in substitution for" as can be seen from the recent decision of this Court in *Western Air Lines, Inc. v. Board of Equalization*, [Feb. 25, 1987] Daily Exec. Rpt. (BNA) No. 36 at J-5 (U.S. Feb. 24, 1987) (No. 85-732), where this Court stated that a tax was an " 'in lieu tax' " where it "applied to the exclusion of any other tax on the property, in other words, to taxes applied in lieu of any other possible property tax." *Id.* at J-8. That in lieu of means in substitution for is also demonstrated by another Federal tax statute which contains the same language, Section 903 of the Internal Revenue Code. The regulations under section 903 provide that in order to meet the "in lieu" requirement, the tax must be "in substitution for, and not in addition to [a] . . . tax . . ." Treas. Reg. § 1.903-1(b)(1) (1983). Judicial construction of the language is in accord. *Allstate Insurance Co. v. United States*, 419 F.2d 409 (Ct. Cl. 1969).

This meaning is confirmed by the wording of section 3701 as amended in 1982 "without substantive change." *American Bank*, 463 U.S. at 859 n.1. The amendment replaced "in lieu thereof" with "another nonproperty tax instead of a franchise tax".[13]

The Bank Tax is levied concurrently with, not in substitution for, the state franchise tax (which was levied at the rate of 12 per cent in 1977). The Bank Tax is thus in addition to the state franchise tax established by the state legislature. It is not in lieu of a franchise tax and cannot tax income from Federal obligations.

Since it was Congress's intent to protect so broadly United States obligations from even indirect taxation, it would make little sense to allow multiple direct taxes within that exception. If a city, county, sewer district and any other political subdivision could each impose an income based "nonproperty" tax on the same Federal interest income which is already subject to a state franchise tax, no United States obligations would be free

[13] The current version of section 3701, by use of the singular, also makes clear that only one franchise tax is permitted so that even if the Bank Tax were a franchise tax it could not be applied in addition to the State franchise tax.

from double taxation. This Court should step in to prevent an imposition of the Bank Tax, which if sustained will allow taxation of United States obligations by any political subdivision, rendering section 3701 meaningless.

4. **Bankers Trust's claim was properly raised before the City and, in any event, the City's procedural argument that it was not does not defeat the jurisdiction of this Court because there is unquestionably no "plain statement" that the decision of the Court below rested on this ground.**

The City's contention that Bankers Trust's claim that the Bank Tax impermissibly taxed United States obligations was not properly before the City does not defeat the jurisdiction of this Court. This court has recently established a new bright-line test for determining whether its jurisdiction over a federal question is vitiated because a state court decision is based upon an independent and adequate state ground. As articulated in *Michigan v. Long*, 463 U.S. 1032, 1042 (1983), this rule requires a " 'plain statement' that a decision rests upon adequate and independent state grounds." *See also New York v. Class*, 106 S.Ct. 960, 963-964 (1986). In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), this Court applied the rule in a case in which a state procedural irregularity was urged as a basis for divesting the Court of jurisdiction, saying:

> The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.

472 U.S. at 327 (citation omitted). In the present case, it is beyond dispute that there was no "plain statement" by the court below that it was relying on any procedural defect,[14] since it wrote no opinion.

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[14] The City devoted only one page of its 26-page brief in the court below to this procedural argument and none of the lower court orders indicated that they were based upon any alleged procedural irregularity, which reasonably could be expected to have been stated (at least briefly) if such were the case.

Moreover, there is no merit to a contention that Bankers Trust was either barred by the statute of limitations or that it did not properly raise its claim. There is not even a colorable basis for the position that Bankers Trust's claim was barred by the statute of limitations as Bankers Trust filed its Supplement to Grounds for Petition in July 1983, while the limitations period had been extended by agreement with the City until December 1983. Also, the Bank Tax procedural provisions permitted the assertion of refund claims in a deficiency proceeding, while they specifically prohibited the filing of a separate claim while that proceeding was pending. N.Y.C. Admin. Code § R46-68.0(6) (now § 11-678(6)). (10a)

To the extent that the City may contend that Bankers Trust's claim was defective because it was raised after the evidentiary hearing (17a, 18a), the City must also fail because there is no statute or regulation which imposes such a time limit. Further, that this aspect of the City's position is without merit is also made clear by a very recent New York appellate court decision which considered the substantially identical state administrative procedure. *Johnson v. New York State Tax Commission*, 117 A.D.2d 867, 498 N.Y.S.2d 581 (3d Dep't 1986). There the court held that the question of whether interest on United States obligations was properly being taxed was properly raised where the taxing authority was "afforded . . . an opportunity to correct the alleged error in tax assessment." 117 A.D.2d at 868, 498 N.Y.S.2d at 582. In *Johnson*, the court held that the issue was properly raised and preserved for judicial review even though the evidentiary record was closed and "the solitary reference to such interest [was] by way of a footnote in the statement of facts in petitioners' brief to respondent . . . ." 117 A.D.2d at 868, 498 N.Y.S.2d at 582.

In the case at bar the issue was specifically raised in the Supplement to the Petition filed only eleven days after the close of the evidentiary hearing. It was also fully discussed in both Bankers Trust's and the City's formal briefs, which were filed at least fifteen months before the City issued its decision. Under *Johnson* the issue was properly raised. The City was certainly

afforded the opportunity to consider the legal issue involved, and its final determination discusses at length the results of such consideration.[15] Accordingly, both on the basis of the "plain statement" rule and on the merits, the state procedural claim mentioned in the City's administrative determination is no bar to this Court's jurisdiction.

[15] To the extent the City felt that it needed to call further witnesses after Bankers Trust highlighted the issue by bringing the *American Bank* decision to the attention of the City, the City could have reopened the hearing, which had already been reopened once. There was no dispute over the facts, however, the issue being solely a legal one.

CONCLUSION

Millions of dollars of interest on United States obligations were taxed at the aggregate state and city rates of 25.823 per cent in New York City in 1977 (and are being taxed at aggregate rates of 19.53 per cent currently). The intermediate state appellate court did not consider the matter to warrant discussion; and the state high court did not view the matter as even worthy of its attention. If this is what the Congress intended when it enacted section 3701, it might as well not have bothered.

For the foregoing reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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March 6, 1987

APPENDIX

Statutory Provisions

New York State Enabling Legislation

CITY CORPORATE BUSINESS AND CITY UNINCORPORATED BUSINESS INCOME TAX

Laws 1966, Chapter 772

As amended by L.1966, cc. 776 and 780

Effective July 1, 1966.

AN ACT to enable any city having a population of one million or more to raise tax revenue by authorizing the imposition of taxes on general, financial, insurance and transportation corporations and on unincorporated businesses to provide for the administration and review of such new taxes, to provide for the suspension of any tax on gross income of conduit companies imposed by such city and for the suspension and repeal of any general business and financial tax imposed by any such city, to amend the tax law in relation to authorizing an increase in the rates of tax which such city may impose on utilities and vendors of utility services, and to repeal article two-B of the general city law, authorizing the imposition of a general business and financial tax by such city.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. [Authorization of tax]. Notwithstanding any other provision of law to the contrary, any city having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing for any such city taxes on general corporations, financial corporations, insurance corporations and transportation corporations. The terms of such local law or local laws shall

be, substantially, as follows except that the appendix in such local laws may be amended for the purpose of conforming it with the United States internal revenue code or other federal laws relating to taxation as presently in effect or as they may be amended:

City Business Tax

Model Local Law

* * *

PART III—FINANCIAL CORPORATION TAX

SUBPART 1—TAX ON STATE BANKS, TRUST COMPANIES, FINANCIAL CORPORATIONS AND SAVINGS AND LOAN ASSOCIATIONS

* * *

§ 12. Tax based on net income; imposition; minimum tax; new incorporations; dissolution; consolidation; mergers; etc.

1. For the privilege of doing business in the city:

(a) Every bank and savings and loan association organized under the authority of this state;

(b) Every trust company incorporated, organized or formed under, by or pursuant to a law of the state, other than a trust company all of the stock of which is owned by not less than twenty savings banks organized under a law of the state, and every domestic corporation authorized to do a trust company's business solely or in connection with any other business, under a general or special law of the state;

(c) Every other domestic financial corporation;

(d) Every incorporated foreign banker doing a banking business and every other foreign financial corporation; and

(e) Every federal savings and loan association located within the city,

shall annually pay a tax at the rate of four and one-half per centum, to be computed as provided in this subpart, upon the basis of its net income for each calendar year, beginning with the calendar year nineteen hundred sixty-six, next preceding the date when such tax becomes due and, if the taxpayer is required to file a declaration of estimated tax and to make payments on account of such estimated tax as provided by section thirty-five of this part, upon the basis of its net income for the calendar year with respect to which such declaration is required to be filed.

* * *

§ 20. Gross income defined

1. The term "gross income" includes gains, profits and income derived from the business, of whatever kind and in whatever form paid, including gains, profits or income from dealings in property, whether real or personal, or gains, profits or income received as compensation for services, as interest, rents, commissions, brokerage or other fees, or otherwise in carrying on such business, including all dividends received on stocks and all interest received from federal, state, municipal or other bonds.

* * *

Laws 1972, Chapter 874

An Act to amend chapter seven hundred seventy-two of the laws of nineteen hundred sixty-six, entitled "An act to enable any city having a population of one million or more to raise tax revenue by authorizing the imposition of taxes on general, financial, insurance and transportation corporations and on unincorporated businesses to provide for the administration and review of such new taxes, to provide for the suspension

of any tax on gross income of conduit companies imposed by such city and for the suspension and repeal of any general business and financial tax imposed by any such city, to amend the tax law in relation to authorizing an increase in the rates of tax which such city may impose on utilities and vendors of utility services, and to repeal article two-B of the general city law, authorizing the imposition of a general business and financial tax by such city," in relation to permitting the local law imposing a city tax on corporations to be amended to conform it with similar provisions of article thirty-two of the tax law as presently in effect or as it may be amended.

Approved and effective June 8, 1972.

Passed on message of necessity.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The opening paragraph of section one of chapter seven hundred seventy-two of the laws of nineteen hundred sixty-six, entitled "An act to enable any city having a population of one million or more to raise tax revenue by authorizing the imposition of taxes on general, financial, insurance and transportation corporations and on unincorporated businesses to provide for the administration and review of such new taxes, to provide for the suspension of any tax on gross income of conduit companies imposed by such city and for the suspension and repeal of any general business and financial tax imposed by any such city, to amend the tax law in relation to authorizing an increase in the rates of tax which such city may impose on utilities and vendors of utility services, and to repeal article two-B of the general city law, authorizing the imposition of a general business and financial tax by such city", as last amended by chapters one hundred seventy-eight and four hundred ten of the laws of nineteen hundred seventy-one, is hereby amended to read as follows:

Notwithstanding any other provision of law to the contrary, any city having a population of one million or more, acting through its local legislative body, is hereby authorized and

empowered to adopt and amend local laws imposing for any such city taxes on general corporations, financial corporations, insurance corporations and transportation corporations at the rates provided herein, or if alternative rates are provided, then, in such event, at either of such rates. The terms of such local law or local laws shall be, substantially, as follows except that any such local law may be amended for the purpose of conforming it with similar provisons of articles nine-A, nine-B, nine-C, twenty-seven *and thirty-two (except section fourteen hundred fifty-six thereof)* of the tax law *and section eight of chapter one hundred sixty-seven of the laws of nineteen hundred seventy-two* as presently in effect or as they may be amended provided, however, *that in sections fourteen hundred sixty and fourteen hundred sixty-one of the tax law the word "July" shall be read as "June", and* no such local law may be enacted or amended to conform to any amendment to articles nine-B or nine-C of the tax law which both increases the rate of such taxes and provides a credit for sales and compensating use taxes paid under articles twenty-eight and twenty-nine of the tax law, *provided further, however, that in the event that any local law is adopted imposing a tax such as is imposed by such article thirty-two of the tax law, then no tax such as is or has been imposed by articles nine-B and nine-C of such tax law shall be imposed by such city for any periods for which a tax such as is imposed by such article thirty-two is imposed and the rates of tax under any such local law imposing a tax such as is imposed by such article thirty-two shall be, for the basic tax analogous to that fixed by subsection (a) of section fourteen hundred fifty-five of the tax law, five and sixty-three one-hundredths per centum, for the alternative minimum tax analogous to that fixed under paragraph one of subsection (b) of such section, one and one quarter mills per dollar of issued capital stock apportionable to such city, for the alternative minimum taxes analogous to those fixed by paragraphs two and three of such subsection, one and forty-three one hundredths per centum, and*

twelve and one-half dollars respectively; and except that the appendix in such local laws may be amended for the purpose of conforming it with the United States internal revenue code or other federal laws relating to taxation as presently in effect or as they may be amended:

§ 2. This act shall take effect immediately.

New matter is in *italics*.

New York City Tax Statutes

NEW YORK CITY FINANCIAL CORPORATION TAX

The New York City Financial Corporation Tax, as in effect in 1977, in pertinent part, provided:

§ R46-37.1 **Imposition of tax.** – (a) For the privilege of doing business in the city in a corporate or organized capacity, a tax, computed under section R46-37.5, is hereby annually imposed on every banking corporation for each of its taxable years, or any part thereof, beginning on or after January first, nineteen hundred seventy-three.

(b) In the case of a taxpayer whose taxable year is other than a calendar year, there is hereby imposed a tax for the privilege of doing business in the city in a corporate or organized capacity for the period beginning January first, nineteen hundred seventy-three and extending through the subsequent part of its first such taxable year ending after such date. Such tax shall be computed under section R46-37.5 on the basis of such taxpayer's entire net income, or other applicable basis as the case may be, for such period and shall be paid with a return which shall be separately filed with the finance administrator not later than the fifteenth day of the third month succeeding the close of such period. The requirements of section R46-37.6 and R46-37.7, relating to declarations and payments of estimated tax, except subdivision (a) of section R46-37.7, shall not be applicable to the tax imposed by this subdivision.

* * *

§ R46-37.3 **Computations of entire net income.** – (a) Entire net income means total net income from all sources which shall be the same as the entire taxable income which the taxpayer is required to report to the United States treasury department, except as hereinafter provided.

(b) Entire net income shall be computed without the deduction or exclusion of:

(1) any part of any income from dividends or interest on any kind of stock, securities or indebtedness, except that there shall be excluded any amounts treated as dividends pursuant to section seventy-eight of the internal revenue code; . . . .

* * *

§ R46-37.5.3 **Computation of tax for taxable years beginning on or after January first, nineteen hundred seventy-five.** – For taxable years beginning on or after January first, nineteen hundred seventy-five, the tax imposed by section R46-37.1 shall be the greater of the following computations:

(a) Basic tax. (1) Except for a savings bank and savings and loan association, thirteen and eight hundred twenty-three one-thousandths per cent of the taxpayer's entire net income, or the portion thereof allocated to this city, for the taxable year, or part thereof. . . .

* * *

(b) Alternative minimum tax. If the tax under subdivision (a) is less than any of the following amounts, the tax shall be the largest of the following amounts:

(1) Except for a savings bank and savings and loan association, two and six-tenths mills upon each dollar of such part of the taxpayer's issued capital stock on the last day of the taxable year, at its face value, but if such taxpayer has stock without par value, such stock shall be taken at its actual or market value, and not less than five dollars per

share, as may be determined by the finance administrator, as the gross income of such taxpayer derived from business carried on within the city, during such taxable year bears to its gross income derived from all business, both within and without the city during said year; except that if the period covered by the return is other than twelve months, the tax shall be prorated on the basis of the number of months or major portions thereof included in the return. For purposes of this paragraph, the term "gross income" shall have the same meaning as it has in the laws of the United States relating to federal income taxes. . . .

* * *

(4)(i) Except for a savings bank and savings and loan association, twenty-five dollars. . . .

* * *

§ R46-64.0 **Limitations on assessment.**

* * *

3. **Exceptions.** —

* * *

(b) **Extension by agreement.** — Where, before the expiration of the time prescribed in this section for the assessment of tax, both the director of finance and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. . . .

* * *

§ R46-68.0 **Limitations of credit or refund.** — 1. General. — Claim for credit or refund of any overpayment of tax under any of

the named parts shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed within two years from the time the tax was paid. If the claim is filed witin the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. If the claim is not filed within the three year period, but is filed within the two year period, the amount of any credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim. Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed. For special restriction in a proceeding on a claim for refund of tax paid pursuant to an assessment made as a result of (a) a net operating loss carryback, or (b) an increase or decrease in federal or New York state taxable income or federal or New York state tax, or (c) a federal or New York state change or correction or renegotiation, or computation or recomputation of tax, which is treated in the same manner as if it were a deficiency for federal or New York state income tax purposes, see paragraph (g) of subdivision three of section R46-64.0.

2. Extension of time by agreement—If an agreement under the provisions of paragraph (b) of subdivision three of section R46-64.0 (extending the period of assessment of tax) is made within the period prescribed in subdivision one for the filing of a claim for credit or refund, the period for filing a claim for credit or refund, or for making credit or refund if no claim is filed, shall not expire prior to six months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof. The amount of such credit or refund shall not exceed the portion of the tax paid after the execution of the agreement and before the filing of the claim or the making of the credit or refund, as the case may be, plus the portion

of the tax paid within the period which would be applicable under subdivision one if a claim had been filed on the date the agreement was executed. . . .

* * *

6. Effect of a petition to director of finance. – If a notice of deficiency for a taxable year has been mailed to the taxpayer under section R46-62.0 and if the taxpayer files a timely petition with the director of finance under section R46-70.0, he may determine that the taxpayer has made an overpayment for such year (whether or not he also determines a deficiency for such year). No separate claim for credit or refund for such year shall be filed, and no credit or refund for such year shall be allowed or made, except –

(a) as to overpayment determined by a decision of the director of finance which has become final; and

(b) as to any amount collected in excess of an amount computed in accordance with the decision of the director of finance which has become final; . . .

* * *

7. Limit on amount of credit or refund. – The amount of overpayment determined under subdivision six shall, when the decision of the commissioner of finance has become final, be credited or refunded in accordance with subdivision one of section R46-67.0 and shall not exceed the amount of tax which the commissioner of finance determines as part of his decision was paid –

(a) after the mailing of the notice of deficiency, or

(b) within the period which would be applicable under subdivision one, two or three, if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the ground upon which the commissioner of finance finds that there is an overpayment. . . .

* * *

§R46-70.0 **Petition to director of finance.** — 1. General. The form of a petition to the director of finance, and further proceedings before the director of finance in any case initiated by the filing of a petition, shall be governed by such rules as the director of finance shall prescribe. No petition shall be denied in whole or in part without opportunity for a hearing on reasonable prior notice. Such hearing shall be conducted by the director of finance, or by a hearing officer designated by the director of finance to take evidence and report to the director of finance. The director of finance shall decide the case as quickly as practicable. Notice of decision shall be mailed promptly to the taxpayer by certified or registered mail at its last known address, and such notice shall set forth the director's findings of fact and a brief statement of the grounds of decision in each case decided in whole or in part adversely to the taxpayer.

2. Petition for redetermination of a deficiency. — Within ninety days, or one hundred fifty days if the notice is addressed to a taxpayer whose last known address is outside of the United States, after the mailing of the notice of deficiency authorized by section R46-62.0, the taxpayer may file a petition with the commissioner of finance for redetermination of the deficiency. Such petition may also assert a claim for refund for the same taxpayer year or years, subject to the limitations of subdivision seven of section R46-68.0. For special restriction where the notice of deficiency relates to a proposed assessment made as a result of (a) a net operating loss carryback, (b) an increase or decrease in federal or New York state taxable income or federal or New York state tax, or (c) a federal or New York state change or correction or renegotiation, or computation or recomputation of tax, which is treated in the same manner as if it were a deficiency for federal or New York state income tax purposes, see paragraph (g) of subdivision three of section R46-64.0.

3. Petition for refund. — A taxpayer may file a petition with the director of finance for the amounts asserted in a claim for refund if —

(a) the taxpayer has filed a timely claim for refund with the director of finance,

(b) the taxpayer has not previously filed with the director of finance a timely petition under subdivision two for the same taxable year unless the petition under this subdivision relates to a separate claim for credit or refund properly filed under subdivision six of section R46-68.0, and

(c) either (1) six months have expired since the claim was filed, or (2) the director of finance has mailed to the taxpayer, by registered or certified mail, a notice of disallowance of such claim in whole or in part.

No petition under this subsection shall be filed more than two years after the date of mailing of a notice of disallowance, unless prior to the expiration of such two year period it has been extended by written agreement between the taxpayer and the director of finance. If a taxpayer files a written waiver of the requirement that he be mailed a notice of disallowance, the two year period prescribed by this subdivision for filing a petition for refund shall begin on the date such waiver is filed.

4. Assertion of deficiency after filing petition. –

(a) Petition for redetermination of deficiency. – If a taxpayer files with the director of finance a petition for redetermination of a deficiency, the director of finance shall have power to determine a greater deficiency than asserted in the notice of deficiency and to determine if there should be assessed any addition to tax or penalty provided in section R46-66.0, if claim therefor is asserted at or before the hearing under rules of the director of finance.

(b) Petition for refund. – If the taxpayer files with the director of finance a petition for credit or refund for a taxable year, the director of finance may

(1) determine a deficiency or such year as to any amount of deficiency asserted at or before the hearing under rules of the director of finance and within the period in which an assessment would be timely under section R46-64.0, or

(2) deny so much of the amount for which credit or refund is sought in the petition, as is offset by other issues pertaining to the same taxable year which are asserted at or before the hearing under rules of the director of finance.

(c) Opportunity to respond. — A taxpayer shall be given a reasonable opportunity to respond to any matters asserted by the director of finance under this subdivision.

(d) Restriction on further notices of deficiency. — If the taxpayer files a petition with the commissioner of finance under this section, no notice of deficiency under section R46-62.0 may thereafter be issued by the commissioner of finance for the same taxable year, except in case of fraud or with respect to an increase or decrease in federal or New York state taxable income or federal or New York state tax or a federal or New York state change or correction or renegotiation, or computation or recomputation of tax, which is treated in the same manner as if it were a deficiency for federal or New York state income tax purposes, required to be reported under part two or part three of this title. . . .

* * *

§ R46-71.0 **Review of director's decision.** — 1. General. — A decision of the director of finance shall be subject to judicial review at the instance of any taxpayer affected thereby in the manner provided by law for the review of a final decision or action of administrative agencies of the city. An application by a taxpayer for such review must be made within four months after notice of the decision is sent by certified or registered mail to the taxpayer.

2. Judicial review exclusive remedy of taxpayer. — The review of a decision of the director of finance provided by this section shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for the taxes imposed by the named parts. . . .

* * *

Decision of the New York City Department of Finance

DEPARTMENT OF FINANCE BUREAU OF HEARINGS
225 BROADWAY
NEW YORK, N.Y. 10007

FHD (28)-FC-11/84(0-0-0)
Financial Corporation Tax
November 27, 1984

CITY OF NEW YORK
DEPARTMENT OF FINANCE

In the Matter of the Petition
of
BANKERS TRUST NEW YORK CORPORATION

for Redetermination of the Deficiency of Financial Corporation Tax under Title R of Chapter 46 of the Administrative Code of the City of New York for the year ended December 31, 1977.

DECISION

Petitioner, Bankers Trust New York Corporation, 280 Park Avenue, New York, New York, filed a petition for redetermination of a deficiency of Financial Corporation Tax under Title R of Chapter 46 of the Administrative Code of the city of New York for the year ending December 31, 1977.

A hearing was held before Gennaro G. Columbus, Hearing Officer at the offices of the Department of Finance, 225 Broadway, New York, New York, which commenced on May 17, 1983 and continued daily, thereafter, until it was concluded on June 2, 1983. The hearing was subsequently re-opened on June 30, 1983, by mutual agreement of the parties for entry of additional evidence into the record. Petitioner appeared by White & Case (David Sachs, Esq., of Counsel). The Department of Finance appeared by Stephen B. Shiffrin, Esq., Assistant Commissioner and Special Counsel.

ISSUE

Whether a post-hearing claim that income was exempt from financial corporation tax, and which raised questions of fact and law, was properly before the Bureau of Hearings.

FINDINGS OF FACT

1. The hearing in this matter was first concluded on June 2, 1983. Motion to reopen was granted and the hearing was next closed on June 30, 1983. There has been no motion to again reopen the hearing.

2. On July 11, 1983, petitioner submitted a "Supplement to grounds for petition", in which, for the first time petitioner claims that it erroneously included in its entire net income, interest on obligations of the United States in the amount of $26,043,451.

3. Thereafter, petitioner and the Department of Finance entered into post-hearing settlement discussions which resulted in a Stipulation resolving all issues relating to the deficiency asserted in the Notice of Determination dated December 13, 1982 and revised Notice of Determination dated April 12, 1983. Paragraph one of the Stipulation recites the type and amount of income to be added to petitioner's entire net income, and acknowledges receipt by the Department of the resulting tax and interest, with certain reservations not relevant here.

4. Paragraph four of the Stipulation, provides in pertinent part as follows:

> "...The Department shall make a determination of the taxpayer's claims [for exclusion of interest income on obligations of the United States]..."

This is the only issue not resolved by the parties which requires consideration by the Bureau of Hearings.

5. It is petitioner's contention that Rev. Stat. §3701, 31 USC §742 [Now § 3124(a)] exempts interest income on obligations of the United States from City of New York financial corporation tax. That section provided in pertinent part as follows:

> "All stocks, bonds, Treasury notes and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, *except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations* and except estate taxes or inheritance taxes [Emphasis added]."

Petitioner argues that the City financial corporation tax is not a franchise tax, pointing to the City's lack of a franchising authority.

6. On its 1977 Consolidated Federal Corporation Tax Return, petitioner reported $26,043,451 as interest income from obligations of the United States.

7. Petitioner adduced no other evidence regarding this income or any expenses incurred to produce this income.

8. The City contends that petitioner's post-hearing claim is not properly before the Bureau of Hearings and that, there is no evidence in the record to support petitioner's contention. Additionally, the City argues that the amount in issue does not properly reflect petitioner's interest from obligations of the United States and totally ignores the expenses incurred in producing the income. Finally, the City argues that petitioner's claim fails on the legal merits because the financial corporation tax is a franchise tax.

CONCLUSIONS OF LAW

A. That section R46-70.0.1 of the Administrative Code of the City of New York ("the Code") provides in pertinent part as follows:

> "1. General. The form of a petition to the [commissioner] of finance, and further proceedings before the [commissioner] of finance in any case initiated by the filing of a petition, shall be governed by such rules as the [commissioner] of finance shall prescribe..."

B. That pursuant to section R46-70.0, the Commissioner of Finance promulgated Rules of Practice and Procedure in Proceedings Before the Commissioner of Finance ("Rules").

C. That Rule 2(a) thereof, provides in pertinent part:

> "...The petition shall contain each ground upon which redetermination of the tax or annual vault charge deficiency or upon which a refund is claimed, and the facts relied upon to inform the Commissioner of Finance of the exact basis thereof."

D. That Rule 16 thereof, provides in pertinent part as follows:

> "(a) At the hearing the parties shall have the right to call and examine witnesses, introduce exhibits, and to cross-examine opposing witnesses..."

E. That Section R46-70.0.5 of the Code provides in pertinent part as follows:

> "Burden of proof -- In any case before the [Commissioner] of finance under this part, the burden of proof shall be upon the petitioner [with exceptions not relevant here]..."

F. That the claim raised by petitioner after the close of the hearing in the within matter is not properly before the Bureau of Hearings.

G. That even had petitioner's post-hearing claim been reviewable by the Bureau of Hearings, petitioner could not have prevailed because it failed to meet its burden of proof. In the absence of other evidence, the entry on its federal return,

in and of itself, was insufficient to support the claim for exemption.

H. That even if the record included evidence to support petitioner's claim, it could not be considered because the city did not have an opportunity to exercise its rights under Rule 16(a).

I. That the interpretation of a statute by the agency charged with the statute's enforcement is entitled to great weight (*Matter of Howard v. Wyman*, 28 N.Y. 2d 434, 332 N.Y.S. 2d 683). It has been the longstanding position of the Department of Finance to include interest from obligations of the United States in entire net income for financial corporation tax purposes. This position was taken with knowledge of Rev. Stat. §3701 which has existed in substantially the same form since 1959.

J. That exemptions from tax depend on clear statutory provisions and the burden is upon the taxpayer to establish a right to them (*Matter of Grace v. State Tax Commission*, 37 N.Y. 2d 193, 371 N.Y.S. 2d 715). Even if we could reach the merits, petitioner has not shown upon a clear statutory provision that it is entitled to exclude interest on United States obligations from its entire net income. Rev. Stat. §3701 specifically excepts from its exemption "nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations."

The city's taxes, although not expressly labeled "franchise taxes," are imposed pursuant to state enabling legislation which authorizes taxes essentially the same as the state's franchise taxes on business and banking corporations imposed by Articles 9-A and 32 of the Tax Law. These state taxes not only meet all the requisites of a franchise tax, but are specifically called franchise taxes. Included in the state's authorization to the city to enact taxes comparable to those levied by Articles 9-A and 32 was the authority to provide in the local law for the inclusion in entire net income of income on any kind of indebtedness (Code §§R46-2.0.8(b)(2) and R46-37.3(b)(1), which certainly encompasses interest on United States obligations. It thus seems plain that the state intended to and did authorize the City to

levy "franchise taxes" or, at the very least, "nonproperty taxes in lieu thereof imposed on corporations."

Petitioner's reliance on *American Bank & Trust Co. v. Dallas County* (July 5, 1983), 103 S. Ct. 3369, is in error. That case dealt specifically with a Texas *property* tax on bank shares.

K. That the financial corporation tax is imposed on *net* income. Therefore, even if petitioner had established a right to exempt any of the income in question, interest expenses incurred to produce exempt income would not be deductible.

L. That the revised petition of Bankers Trust New York Corporation pertaining to exclusion from taxable income of interest on United States obligations is denied.

s/Robert Kraut

Robert Kraut, Director
Bureau of Hearings for
Philip R. Michael,
Commissioner
Department of Finance

Order of the Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 27, 1986

Present – Hon. Francis T. Murphy, Presiding Justice
John Carro
J. Robert Lynch
Ernst H. Rosenberger
Richard W. Wallach, Justices.

26954

In the Matter of the Application of Bankers Trust New York Corporation and Consolidated Subsidiaries,

Petitioners,

– against –

Department of Finance of the City of New York and Paul A. Crotty, as Commissioner of Finance,

Respondents.

For an Order and Judgment Pursuant to Article 78 of the CPLR.

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent Commissioner of Finance dated November 27, 1984,

And this proceeding having been transferred by order of said court, entered on May 3, 1985 (Richard Wallach, J.), to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Mr. David Sachs of

counsel for the petitioners, and by Mr. Peter Rabinowitz of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent Commissioner be and the same hereby is confirmed, without costs and without disbursements. The clerk is directed to enter judgment in favor of respondents, confirming the determination.

ENTER:

HAROLD J. REYNOLDS
Clerk.

Orders of the Court of Appeals

State of New York Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eleventh day of September A.D. 1986

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

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1 Mo. No. 989 SSD 100

In the Matter of Bankers Trust New York Corporation and Consolidated Subsidiaries,

Appellants,

vs.

Department of Finance of the City of New York, et al.,

Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

State of New York Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of December A.D. 1986

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-27 Mo. No. 1181

In the Matter of Bankers Trust New York Corporation and Consolidated Subsidiaries,

Appellants,

vs.

Department of Finance of the City of New York, et ano.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

X

New York County Clerk's Index No. 6603-85

In the Matter of the Application
of
BANKERS TRUST NEW YORK CORPORATION
AND CONSOLIDATED SUBSIDIARIES,

Appellants,

– against –

DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK AND PAUL A. CROTTY, AS COMMISSIONER OF FINANCE,

Respondents,

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

X

Notice is hereby given that Bankers Trust New York Corporation and Consolidated Subsidiaries, the appellants above-named, hereby appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York, Appellate Division, First Department (New York County Clerk's Index Number 6603-85), dismissing the petition, entered in this Article 78 proceeding on May 27, 1986, which became a final judgment on December 16, 1986 upon entry of the order of the Court of Appeals of the State of New York denying appellants' motion for leave to appeal.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: New York, New York
February 4, 1987

Yours, etc.

White & Case
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200
Attorneys for Appellants
Bankers Trust New York
Corporation and
Consolidated Subsidiaries

FILED
February 6, 1987
Appellate Division, Superior Court
First Department

TO: Doron Gopstein, Esq.
Acting Corporation Counsel
Attorney for Appellees
100 Church Street
New York, New York 10007

Hon. Harold J. Reynolds
Clerk of the Supreme Court,
Appellate Division
27 Madison Avenue
New York, New York 10010

The Clerk of New York County
60 Centre Street
New York, New York 10007

Affidavit of Service

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

X

New York County Clerk's Index No. 6603-85

In the Matter of the Application
of
BANKERS TRUST NEW YORK CORPORATION
AND CONSOLIDATED SUBSIDIARIES,

Appellants,

—against—
DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK AND PAUL A. CROTTY, AS COMMISSIONER OF FINANCE,

Respondents,

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT S. HERBST, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice law before the courts of this state.

2. On February 4, 1987, I served a copy of the within Notice of Appeal to the Supreme Court of the United States upon the office of the Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007, by placing said Notice of Appeal in a securely wrapped postage pre-paid

envelope addressed to the said office at the aforesaid address, and thereafter by first class mail, mailed it in the envelope containing the said Notice of Appeal.

3. All parties required to have been served by the rules of the Supreme Court of the United States have been served with said Notice of Appeal.

s/Robert S. Herbst
ROBERT S. HERBST

Sworn to before me this
4th day of February, 1987

s/Kimberly Eaton Wheelock
Notary Public